INTENTIONALLY CAUSING ECONOMIC LOSS—BEAUDESERT SHIRE COUNCIL v. SMITH REVISITED

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A THE PRINCIPLE IN *BEAUDESERT SHIRE COUNCIL* v. *SMITH*[1]

In the well known *Beaudesert* case, the High Court of Australia laid down the following principle:

> Independently of trespass, negligence or nuisance, but by an action for damages upon the case, a person who suffers harm or loss as the inevitable consequence of the unlawful, intentional and positive acts of another is entitled to recover damages from that other.

In that case the defendant Council had unlawfully taken gravel from a river. This resulted in the destruction of a natural waterhole and changed the flow of the river, so that the plaintiff landowner could no longer use his pumping installation, as situated, for the irrigation of his land. Applying the above principle, the High Court granted damages for the loss which the plaintiff had suffered through the failure of some crops due to the lack of water and for the expense involved in restoring his supply of water by shifting the pump to another site.

The Common Law moves slowly and major developments or rationalisations of principle are rare. For this reason, the *Beaudesert* judgment was unexpected and exciting: a new, or rediscovered, principle of liability presents a challenge to all students of the law.

In an article shortly after the decision,[2] the *Beaudesert* principle was criticised, *inter alia* on several grounds:

1. The principle was not really derived from the old form of action—the Action on the Case—nor did any of the older decisions cited by the court support it as formulated; instead the High Court was attempting to lay down an entirely new principle.

2. As a new principle, its elements were obscure and possibly too wide. For example, the meaning of certain words, such as "unlawful acts" and "inevitable consequences" were ambiguous. With regard to "intentional acts" there was no evidence that the act of the Council in taking the gravel was in any way "intended" to harm the plaintiff. A principle that there is

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1 (1970) 120 C.L.R. 157 (1966).

2 Dworkin and Harari, "The Beaudesert Decision—Raising the Ghost of the Action upon the Case", (1966-67) 40 A.L.J. 296 and 347. For a more restrictive interpretation of the principle see Higgins, *Elements of Torts in Australia* (1971) 372-4.

liability for intentional activity which was neither "aimed at" the plaintiff nor even "negligent" vis-à-vis the plaintiff was too wide to be acceptable. "Although the new principle is not put forward as a tort of strict liability as it is based on an intentional and unlawful act, it has many of the characteristics of what are generally regarded as torts of strict liability: the plaintiff can recover if there was no intention to injure him and loss or harm to him was not reasonably foreseeable, and all harm suffered by him which qualifies as an 'inevitable (direct?) consequence' of the act is recoverable."[3]

3. The impact of the new principle upon the general law of torts is quite startling. Many of the boundaries of existing torts would be widened to such an extent that the whole structure of the law of torts would have to be re-examined.

The article concluded by asserting that the *Beaudesert* proposition could not be correct as stated, nor could it be accepted as new law. "The law of torts is certainly capable of development and significant changes in it can no doubt be brought about by judicial legislation. But fundamental principles are not simply blown or puffed away by a fortuitous sidewind."[4]

There have been developments in some jurisdictions which are relevant to the *Beaudesert* principle, although, surprisingly, so far, there has been little judicial comment on the principle itself.[5] These are matters which go to the very foundations of the law of torts and which have been examined extra-judicially on many occasions. The object of this article is first, to see to what extent there is gathering support for some wide general principle of liability for intentionally inflicted harm, particularly economic harm, and, secondly, to see whether it is possible or desirable to reformulate the *Beaudesert* principle in a more acceptable way.[6]

To put these developments into perspective, it is necessary to examine briefly some basic and well-known issues in the law of torts.

B THE LONG-STANDING DEBATES

1 *Do we have a law of tort or a law of torts?*

This question, which has been endlessly discussed by academic lawyers,[7] does not usually arouse much understanding or interest in the student beginning his study of tortious liability. Yet, theoretically, it is the core issue. Any layman suffering injury as the result of another's "unjustifiable"

[3] (1966-67) 40 A.L.J. at p. 348.
[4] *Ibid.* p. 351.
[5] See *Grand Central Car Park* v. *Tivoli Freeholders* [1969] V.R. 62; *Sid Ross Agency* v. *Actors Association* [1971] 1 N.S.W.R. 760.
[6] The discussion is confined to common law jurisdictions, and no reference will be made to the interesting continental "Abuse of Rights" doctrine. See Devine, "Some Comparative Aspects of the Doctrine of Abuse of Rights", (1964) Acta Juridica 48.
[7] E.g. Goodhart, "The Foundations of Tortious Liability", (1938) 2 M.L.R. 1; Williams, "The Foundations of Tortious Liability", (1939) 7 Camb.L.J. 111.

action would ordinarily expect to be compensated for his loss or damage; he would not be satisfied if he were told "Yes, granted that the defendant's action was unjustifiable, you cannot recover because the facts do not fit within any existing pigeon-hole of liability, that is, any nominate tort. If you cannot show any known tort you cannot recover." On the other hand, he would be satisfied if he were told: "As the defendant's action was unjustifiable, you can recover; and it does not matter that we cannot give a specific name, for example, trespass, to the wrong you have suffered." It is not difficult to see that to a large degree this is a semantic exercise turning on the significance of "unjustifiable". Nevertheless, the great debate featured the following opposing stances: "There is a fundamental general principle that it is wrongful to cause harm to other persons in the absence of some specific ground of justification or excuse" versus "there are a number of specific rules prohibiting certain kinds of harmful activity, and all the residue is left outside the sphere of legal responsibility."

Pollock and Winfield tended to favour the general theory of liability; Salmond the view that "the law of torts consists of a body of rules establishing specific injuries". It is now generally agreed that neither view is entirely correct: we do not yet have a general theory of liability; nor are there a static number of torts—the existing pigeon-holes widen, develop and, occasionally, new torts are created. The interesting problem posed by the *Beaudesert* decision is whether the court really was in fact attempting to introduce a general theory of liability or was simply expanding an existing tort or creating a new one.

2 *"Interest", "loss and damage"*

Some authors, for example, Street, consider that the question whether there is a law of tort (general principle of liability) or a law of torts (nominate torts) is superfluous, since one should look primarily at the various *interests* which this branch of the law protects. Thus, personal and proprietary interests are protected by such torts as trespass, negligence, conversion, nuisance; reputation is protected by libel and slander, etc. If the interest is not protected there is no remedy.

Since "loss" or "damage" must flow from the interest which has been violated, the terms are much narrower than in popular usage: "Anything that people value—i.e. any 'good'—may be the subject of a loss: life, health, liberty, peace, personal relations, material things, legal relations and so on; as well as the prospect or expectation of any of these things. In this broad sense of the term "loss", a man suffers a loss when he loses the ability to command the favours of his neighbour's wife or when his expectation of a good return from a carefully planned bank-robbery is brought to nothing through the vigilance of the police. It must therefore be added that the losses with which the law of torts is concerned consists of ceasing to have, to possess or to enjoy something that is *recognised* as being

wanted or desired or as held to be desirable in our society; in other words, something that a man may legitimately want or desire."[8]

Having disposed of "illegitimate" losses, it is next necessary to appreciate that simply because a person is deprived of something which he may legitimately want or desire does not mean that he has suffered loss in the eyes of the law. The law has long had a myopic view of the nature of legal loss or damage and has explained, although not justified, this view by use of the latin tag "*damnum sine injuria*"—loss without a wrongful act. Even where there have been wrongful acts, some kinds of loss are more easily identifiable and acceptable to courts than others.

The three broad categories of loss or damage are personal injuries (including death), damage to property and pure economic loss.

With regard to personal injuries, the courts have moved towards a wider appreciation of such loss. Compensation may now be recovered not only for physical injury resulting from impact, but also for some kinds of nervous shock sustained without impact. However, grief and sorrow caused by a person's death are outside the range of personal injuries.[9] Further, the courts have on occasions almost accepted a general principle of liability for personal injuries caused by intentional conduct: "If a person deliberately does an act of a kind calculated to cause physical injury for which there is no lawful justification or excuse and in fact causes physical injury to that other person, he is liable in damages."[10]

Loss or damage to property is also usually readily identifiable by the courts. However, the problems bequeathed by the old forms of action, combined with the commercial law problems which have arisen in the sale and hire of goods, have persuaded the English Law Reform Committee to suggest a general theory of liability concerning chattels: "in general an intentional act, without lawful justification, involving interference with a chattel should be actionable by way of a new tort [wrongful interference with movables] which will supersede conversion, detinue and trespass to chattels."[11]

It is the third kind of loss, pure economic loss, which poses most problems. Insofar as most of the law of torts is concerned with damages, monetary compensation for loss, we are concerned with economic loss; but so long as such economic loss flows from proven damages to the person or property, the courts take that within their stride. The real problems arise when "financial", "pecuniary" or "pure economic" loss is suffered without

[8] Harari, "On the Province and Function of the Law of Torts" (unpublished paper).
[9] *Hinz* v. *Berry* [1970] 2 Q.B. 40. Cf. The right to recover damages for emotional distress alone in some American courts: *State Rubbish Association* v. *Siliznoff* 38 Cal. 2d 330 (1952), *Alcorn* v. *Anbro Engineering Inc.* 2 Cal. 3d 493 (1970).
[10] *Wilkinson* v. *Downton* [1897] 2 Q.B. 57; *Bunyan* v. *Jordan* (1937) 57 C.L.R. 1. See Higgins, *Elements of Torts in Australia* (1971) 85.
[11] Law Reform Committee, 18th Report; Conversion and Detinue, 1971 Cmnd. 4774; for a discussion of this Report, see Bentley, (1972) 35 M.L.R. 171.

any prior damage to person or property. The spectre of unlimited liability —"liability in an indeterminate amount for an indeterminate time to an indeterminate class ",[12]—has proved to be a considerable restraining influence on the courts' willingness to allow recovery for such loss. In recent years, however, efforts have been made to face up to the problems of pure economic loss resulting from negligent conduct. Some brave attempts were made to show that there was no justifiable distinction between pure economic loss and economic loss flowing from damage to person or property: "The interposition of the physical injury is said to make a difference of principle. I can find neither logic nor common sense in this."[13] Nevertheless, the scope of the broad remedy for economic loss flowing from negligent misstatements is still debatable in the light of more recent efforts to restrict it.[14] Similarly, recovery for economic loss suffered as the result of other kinds of negligent activity is now being restricted, illogically, but as a matter of policy, to economic loss flowing from damage to person or property.[15]

There are other difficulties with pure economic loss. First, it may at times be difficult to distinguish it from physical damage: if a builder negligently builds a house which falls down, damages awarded for the cost of putting it up again represents compensation for damage to property; if the house has not yet fallen down but is about to do so, the cost of repairing it to keep it standing and safe is less obviously damage to property and more like pure economic loss.[16] Should a distinction turn on whether the physical damage to property was averted by financial expenditure?

Secondly, economic loss can be suffered in practically all areas of human activity—many of them socially, politically and economically sensitive. Thus economic loss suffered in the process of commercial activity may have to be looked at in the light of legislative and general policy concerning trading in a competitive society, monopolies and restrictive trade practices; economic loss suffered as the result of industrial disputes may have to be looked at in the light of industrial legislation; loss suffered to relational interests, for example, the loss suffered by a husband when his wife is enticed away from him, may have to be examined in the light of the question whether or not remedies for such losses are socially desirable.

There seems, then to be a tendency to move towards general principles of liability in connection with intentional acts causing personal injuries and damage to chattels. Whether the courts are moving towards the general theory of liability for intentionally causing economic loss may depend upon whether the potential size and range of such loss, and the policy

12 *Ultramares Corporation* v. *Touche* 255 N.Y. 170 (1931) per Cardozo J.
13 *Hedley Byrne & Co. Ltd.* v. *Heller* [1964] A.C. 465 per Lord Devlin.
14 *Mutual Life and Citizens Assurance Co.* v. *Evatt* [1971] A.C. 793.
15 *Spartan Steel* v. *Martin* [1973] 1 Q.B. 27.
16 Cf. *Dutton* v. *Bognor Regis* U.B.C. [1972] 1 Q.B. 373.

factors which arise, are too formidable for the courts to handle with confidence.

3 *How far is malice relevant in the law of torts?*[17]

If there were a general theory of liability in the law of torts, "malice" or "improper motive" would be of prime importance—if A, acting out of spite, deliberately injures B, one would expect liability. The advocates of a general theory of liability have been able to find some judicial support for their views.

In England, Bowen L.J. must be given credit for his attempts to develop the notion of liability for maliciously causing damage. In *Ratcliffe* v. *Evans*[18] he said: "That an action will lie for written or oral falsehoods, not actionable *per se* nor even defamatory, where they are maliciously published, where they are calculated in the ordinary course of things to produce, actual damage, is established law. Such an action is not one of libel or slander, but an action on the case for damage wilfully and intentionally done without just cause or excuse, analogous to an action for slander of title."

This statement has helped to establish the modern nominate tort of "injurious falsehood", a rather wide and imprecise pigeon-hole, but nevertheless a pigeon-hole. Earlier, Bowen L.J. had stated a slightly wider principle in his well-known dictum in *Mogul Steamship Co.* v. *McGregor*:[19] "Now intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that person's property or trade, is actionable if done without just cause or excuse." This principle is similar to that in relation to personal injuries established in *Wilkinson* v. *Downton*,[20] but very few lawyers have been prepared to acknowledge that it is yet law in connection with economic loss.

Essentially, the issue in this kind of case is whether or not the courts can protect a person from harm caused by spiteful acts. How far can spite or malice or improper motive make an otherwise "lawful" act "unlawful"?

In the Common Law world the main barriers to such propositions are the leading cases of *Bradford* v. *Pickles*[21] and *Allen* v. *Flood*.[22]

"It is the act, not the motive for the act that must be regarded. If the act, apart from motive, gives rise merely to damage without legal injury, the motive, however reprehensible it may be, will not supply that element."[23]

[17] For a discussion of the wide range of meaning attributed to malice, see Fridman, "Malice in the Law of Torts", (1958) 21 M.L.R. 484.
[18] [1892] 2 Q.B. 524, 527-8.
[19] (1889) 23 Q.B.D. 598, referred to by the High Court in *Beaudesert*. See also Bowen L.J. in *Skinner* v. *Shaw* [1893] 1 Ch. 413, 422.
[20] [1897] 2 Q.B. 57.
[21] [1895] A.C. 587.
[22] [1898] A.C. 1.
[23] [1895] A.C. 587 at 601 per Lord Macnaghten.

Emphasis is thus squarely placed on the lawful or unlawful nature of the activity apart from the motive. On this view the only room for malice as a cause of liability is in the occasional nominate tort, such as injurious falsehood and, more significantly, in the tort of conspiracy where if two or more people deliberately combine together with the predominant purpose of injuring another person, there will be liability even though the activity was otherwise lawful.

C AMERICAN DEVELOPMENTS

1 *The "Prima Facie" Tort*

In the U.S.A. the dicta of Bowen L.J. were very early on received more favourably, and *Bradford* v. *Pickles* and *Allen* v. *Flood* were viewed with greater suspicion. Thus, in one case,[24] it was said: "If the meaning of [these expressions] is that where a person has the lawful right to do a thing irrespective of his motive, his motive is immaterial, the proposition is a mere truism. If, however, the meaning is that where a person, if actuated by one kind of a motive, has a lawful right to do a thing, the act is lawful when done under any conceivable motive, or that an act lawful under one set of circumstances is therefore lawful under every conceivable set of circumstances, the proposition does not commend itself to us as either logically or legally accurate."

This statement was approved in *Tuttle* v. *Buck*,[25] perhaps the leading American case on liability for malice. There, the plaintiff ran a barber shop in a small town. The defendant banker set up a rival shop, undercutting the plaintiff's rates, with the deliberate intention of ruining his business. The court held that this was actionable. "To divert to one's self the customers of a business rival by the offer of goods at lower prices is in general a legitimate mode of serving one's own interest, and justifiable as fair competition. But when a man starts an opposition place of business, not for the sake of profit to himself, but regardless of loss to himself, and for the sole purpose of driving his competitor out of business, and with the intention of himself retiring upon the accomplishment of his malevolent purpose, he is guilty of a wanton wrong and an actionable tort. In such a case he would not be exercising his legal right, or doing an act which can be judged separately from the motive which actuated him. To call such conduct competition is a perversion of terms. It is simply the application of force without legal justification which in its moral quality may be no better than highway robbery."

It was, however, Holmes J. in *Aikens* v. *Wisconsin*[26] who echoed Bowen L.J. with much greater success:

[24] *Plant* v. *Woods* 176 Mass. 492, 57 N.E. 1011 (1900).
[25] 119 N.W. 946 (1909).
[26] 195 U.S. 194, 204 (1904). See also Holmes, "Privilege, Malice and Intent", (1894) 8 Harv. L. Rev. 1.

prima facie, the intentional infliction of temporal damage is a cause of action, which, as a matter of substantive law, whatever may be the form of pleading, requires a justification if the defendant is to escape.

This dictum led to the creation of a new principle in some American courts, particularly in the State of New York; the principle of the "prima facie" tort.[27] Curiously, however, having been given this new tort, the courts were reluctant to take full advantage of its potential. As formulated, and originally understood, it seemed to be a new general theory of liability for intentional harm, regardless of all other heads of liability. In practice, it became a fairly narrow specific tort, although its precise scope is by no means yet established.[28] The fetters placed around this remedy are worth examining, for they may well provide lessons for any common law development in other jurisdictions.

(a) *Malice—disinterested malevolence*

The limits of "malice", "improper motive" or "the intention to injure" are imprecise. Nevertheless malice as the sole cause of a man's activity is rare. Usually people act for a variety of co-existing reasons, self-advancement or other gain usually being present. As with the tort of conspiracy by otherwise lawful means, the courts have found it difficult to impose liability where motives are mixed—some good, some bad. Thus the phrase "disinterested malevolence" has been coined. This means "that the genesis which will make a lawful act unlawful must be a malicious one unmixed with any other and exclusively directed to injury and damage of another."[29]

It is certainly true that the required degree of malice, which is difficult to prove, has frequently acted as a brake on the scope of the remedy: for example, mixed motives of commercial gain and personal antagonism have been held insufficient to support an action for a prima facie tort, even though the commercial gain was sought by morally or ethically questionable means.[30]

(b) *Proof of damage*

As would be expected, to keep the remedy within bounds it is necessary to show specific temporal injury to person, property or reputation.[31]

[27] For a full account see 16 A.L.R. 3d 1191.

[28] ". . . the sub-classification of 'prima facie' tort has perhaps caused more trouble in understanding than what it was supposed to clarify . . ." *Morrison* v. *N.B.C.* per Breitel J.P.

[29] *American Bank and Trust Co.* v. *Fed. Reserve Bank of Atlanta* 256 U.S. 350 (1927) per Holmes J.

[30] *Marcus* v. *Textron* 177 N.Y.S. 2d 964 (1958); see also *Beardsley* v. *Kilmer* 140 N.E. 203 (1923).

[31] Cf. The development of the requirement of special damage in the tort of injurious falsehood.

(c) *The defence of justification*

Words like "justifiable" or "justification" are question-begging. Like "policy" they cloak reasons underlying decisions unless there is further explanation. Whether or not a prima facie tort is justifiable and so not actionable is one for the court to decide. The court may have to consider questions of social and economic policy. The merits of leaving such wide and vague issues to the courts will be discussed later. Many of the American courts, however, have managed to side-step the problem by looking at justification as the other side of the coin to disinterested malevolence. Thus frequently, though not always, the answer seems to be: if there are mixed motives there is justification; if there is disinterested malevolence, there is no justification.

(d) *No other tort remedy available*

Perhaps the main reason for the rather limited development of this remedy has been the insistence that if the conduct complained of falls within any other traditional tort category then the prima facie tort is not available. Thus, the remedy falls into a residual pigeon-hole and unlike many other torts which overlap in a confusing way, such as defamation and privacy in the U.S.A., this remedy is not permitted to overlap since it is not available.[32] It has been said that in view of such a rule it is not surprising that the remedy of the prima facie tort need rarely be invoked, for the categories of tort are many and development within the categories is progressive, so that the prima facie tort doctrine has had its greatest impact and value in the field of trade or business where it generally comprehends interference with some form of contractual relation.[33]

(e) *An otherwise lawful act.*

A related limitation upon the scope of the remedy, inherent in Holmes' dictum, is the rather curious one that the facts must involve pure *Bradford* v. *Pickles* and *Allen* v. *Flood* situations. The disinterested malevolence must convert an otherwise lawful act into a prima facie tort. If the act is in any way unlawful to begin with, then it appears that the prima facie tort remedy is inapplicable.

2 *The "Non-Category" Tort—Morrison* v. *National Broadcasting Co.*[34]

One of the most novel recent tort cases in New York was *Morrison* v. *National Broadcasting Co.* There, the plaintiff, a young university teacher, had participated in a television quiz show which, unknown to him, had been rigged. When this was publicised the plaintiff sought a remedy because

[32] *Best Window Co.* v. *Better Business Bureau* 146 N.Y.S. 2d 382 (1955).
[33] *Ruza* v. *Ruza* 146 N.Y.S. 2d 808 (1955).
[34] 266 N.Y.S. 2d 406 (1965).

the defendants had intentionally deceived him by leading him to believe that the show was honest and his reputation had been injured as a result of the public scandal. The judgment of Breitel J.P. in the Supreme Court of New York is of considerable interest. It was argued, and the court accepted, that the facts did not fit within any of the established tort categories: the separate elements did not fall within any one classic category of tort but were found only in a combination of such categories. The facts did not satisfy all the elements of the tort of defamation,[35] or of the tort of deceit or of the tort of negligence. What, then, of the prima facie tort? This was inapplicable, in the view of Breitel J.P. for a number of reasons: there was no disinterested malevolence since the defendants did not rig the show only to injure the plaintiff; conversely, the defendants' activity could be said to be justified since they were engaged in pursuit of economic gain for themselves. A further reason was that the prima facie tort, being available only for otherwise lawful acts, was not applicable here since the activity was "unlawful". What aspect of this case was unlawful? The judgment is not clear, but demonstrates the way in which it is possible to shift one's focus from "unlawful" in the sense of "illegal" to "immoral" and then blur the two notions together:[35a]

> "The means used were not lawful or privileged, in the sense of affirmatively sanctioned conduct, but were intentional falsehood without benevolent purpose uttered to induce action by another to his detriment. The ultimate purpose and the scheme were corrupt, in the sense that no socially useful purpose but only gain by deceit was intended, although perhaps not 'illegal'."

It may be that the activity could have been dubbed unlawful because the court found that another tort had been committed. Breitel J.P. seemed to classify the prima facie tort as one of the traditional torts and found, of necessity, that there was a wider residual "non-category" tort to be called in aid whenever justice so demanded: ". . . this case explores the common law reach in providing a remedy for foreseeable harms from intentional conduct." Drawing support from earlier cases, which had gained sustenance from the dictum of Bowen L.J. in *Ratcliffe* v. *Evans*,[36] the learned judge put forward the following wide principle: ". . . where the conduct is purposively corrupt by conventional standards, intentional as to consequences, or utilizes vicious means (again by conventional standards), the law will allow general recovery for foreseeable harm to established protected interests, such as reputation in trade or occupation, reputation for chastity or honesty, consortium, and, at one time, the love and affection of another."

[35] The Court of Appeals unanimously reversed this decision (280 N.Y.S. 2d 641 (1967)) on the ground that the facts did establish the tort of defamation and the action was consequently barred by a one year statute of limitations.

[35a] Supra, fn. 34 at 409.

[36] [1892] 2 Q.B. 524.

These developments, mainly in New York State, are of course still incomplete. But they provide some pointers for other jurisdictions, First, the broad new principle of liability rejected in England but accepted in New York, was nowhere near as effective as one might have supposed; the prima facie tort appears to have been hived off and neutralised except in limited situations. Secondly, *Morrison* v. *N.B.C.* indicates that efforts are still being made to establish what may be described as either a new general principle or a wide residual tort category. Thirdly, the courts have sometimes overstressed the issue of lawful and unlawful acts and are sometimes not certain where the boundary is; a matter to which it will be necessary to return.

D THE TECHNIQUES OF COMMON LAW DEVELOPMENT

In recent years the judiciary has at last admitted that it has a creative role in the development of common law principles. Even so, few judges are prepared to introduce brand new legal principles; instead they prefer, understandably, to show that the new principle is in fact a legitimate development of existing principles, and usually every effort is made to support new law by a line of existing case-law authority. Thus, it is not clear whether the tort of intimidation is in reality a new tort created by *Rookes* v. *Barnard*[37] or is merely a logical development of long established principle. In the *Beaudesert* decision, the High Court of Australia maintained that the restatement of the Action on the Case was a product of reasoned development of existing case-law whereas it has been argued that it is in fact a new principle. What is clear, of course, is that a series of gradual developments of existing law produce, in time, rationalisations which occasionally reveal an all-embracing general principle—such as occurred, for example, with negligence. Whether this is development or new principle does not matter very much, once the wide principle is accepted. The difficulty, at any period of the common law, is to know whether a group of developing remedies are in fact distinct, or whether they form part of a wider general principle; and, if so, what the scope of the wider general principle is likely to be.

In recent years, in the Common Law world outside the U.S.A., more people have been questioning whether or not the rather haphazard development of case-law in the economic sphere is part of a movement towards a larger general principle, in spite of the rebuffs to Bowen L.J.'s dicta in cases such as *Bradford* v. *Pickles* and *Allen* v. *Flood*.

It is not possible here to examine the piece-meal development in detail, but it is of interest to examine the frequently overlapping techniques used by the courts in the progress towards, and search for, a wider principle.

[37] [1964] A.C. 1129.

1 *Stretching and Widening the Boundaries of Existing Torts*

Many of the nominate torts can still easily be traced back to the old forms of action. Frequently these still influence the definitions of torts and in any fact situation the absence of any one requirement of a tort will usually prevent that particular tort from being available. It is not uncommon, however, to find that some of these requirements are in time re-interpreted and sometimes relaxed. In the tort of passing off it had been accepted that the plaintiff and defendant must be actual or potential competitors in some sphere of business activity before an action could lie, but this requirement is gradually being discarded.[38] In the tort of inducing breach of contract it was until recently thought that an action would not lie unless, *inter alia*, the defendant had actual or constructive knowledge not only of the contract itself, but also of the particular terms of it which had been broken,[39] and also that there was in fact a *breach* of that contract. Now, however, it is enough if the defendant simply recklessly disregards the means of knowledge;[40] and it is possible that the tort is committed even though the inducement does not cause a breach but simply an interference with the contract.[41]

2 *The Action on the Case and Negligence as Residuary Categories*

It has been shown elsewhere how the tort of negligence and, to a lesser extent today, the Action on the Case, may be used to justify new remedies within existing categories.[42] Negligence is a tort which is continually expanding. "To hold that there is a duty of care in a new kind of situation is the modern equivalent of sanctioning a new writ. But since negligence became a tort, instead of a convenient title for a miscellany, it has been possible for us to go on believing in the difficulty of creating new torts without seeing an incongruity in the growth of negligence; and it has been easiest for us to establish new liabilities, new duties, in terms of duties of care. The tort of negligence is the residuary legatee of the action on the case."[43] The action on the case is still occasionally used in connection with some intentional harm and, of course, it was revised and reformulated in *Beaudesert*.

38 *McCulloch* v. *May* [1947] 2 All E.R. 845. Cf. *Radio Corporation Pty. Ltd.* v. *Henderson* [1960] N.S.W.R. 279; *Annabel's (Berkeley Square) Ltd.* v. *Shock* [1972] F.S.R. 261.

39 *British Industrial Plastics Ltd.* v. *Ferguson* [1938] 4 All E.R. 504; *D.C. Thomson Ltd.* v. *Deakin* [1952] Ch. 646.

40 *Emerald Construction* v. *Lowthian* [1966] 1 W.L.R. 691; *Sid Ross Agency* v. *Actors Association* [1970] 2 N.S.W.R. 47; [1971] 1 N.S.W.R. 760.

41 *Torquay Hotel Ltd.* v. *Cousins* [1969] 2 Ch. 106.

42 Dworkin and Harari, (1967) 40 A.L.J. at 302-3.

43 Milsom, "Reason in the Development of the Common Law", (1965) 81 L.Q.R. 496 at 516.

3 *Overstretching and thus creating new torts*

This can be illustrated by another passing-off example. In *Bollinger* v. *Costa Brava*[44] the plaintiffs, manufacturers of champagne in the Champagne district of France were able to succeed in an action against the defendants who were manufacturing and selling "Spanish Champagne", even though the defendants may not have had any intention to deceive and the word "champagne" was not associated with any particular producer of champagne but rather the district itself. Danckwerts J., in reply to the argument that in order to succeed the plaintiff must first establish that the case must fall within the class of actionable wrongs, said: "But the law may be thought to have failed if it can offer no remedy for the deliberate act of one person which causes damage to the property of another. There are such cases, of course, but they occur, as a rule, when the claims of freedom of action outweigh the interests of the other persons who suffer from the use which a person makes of his own property. . . ."

Having said that, it is not clear from his judgment whether he is relaxing the boundaries of passing off: ". . . I do not believe that the law of passing off . . . is so limited in scope" or attempting to create a new wider tort: ". . . the law in this respect has been concerned with unfair competition between traders rather than with the deception of the public. . . . The law should and does provide a remedy for [this] type of unfair competition."

The lead provided in this case was accepted in a comparable "British Sherry" case, *Vine Products Ltd.* v. *Mackenzie & Co.*[45] where Cross J. spoke of *Bollinger* v. *Costa Brava* as having "uncovered a piece of common law or equity which had till then escaped notice . . . In truth the decision went beyond the well-trodden paths of passing-off into the unmapped area of 'unfair trading' or 'unlawful competition' and then there was reference to a new-fangled tort called 'unfair competition'."

Another recent example of a new developing tort is that of Breach of Confidence.[46] It has long been established, particularly in the field of employment, that one party to a contract would have a right of action against the other in connection with the disclosure to third parties of confidential information. This remedy is now available independently of contract or property rights to persons whose confidences have been breached. Thus, a husband and third parties may be restrained by a wife from publishing matrimonial confidences.[47] In the case establishing this, Ungoed-Thomas stated: "If this were a well-developed jurisdiction doubtless there would be guides and tests to aid in exercising it . . . [but] . . . the court is not to be deterred merely because it is not already provided with fully developed principles, guides, tests, definitions and the full

[44] [1960] Ch. 262.
[45] [1969] R.P.C. 1.
[46] North, "Breach of Confidence: Is there a new tort?" [1972] J.S.P.T.L. 149.
[47] *Argyll* v. *Argyll* [1967] Ch. 302.

armament for judicial decision." Similarly, in *Seager* v. *Copydex*[48] an inventor recovered against defendants who had inadvertently used an idea of his, which had been supplied by him in confidence. It is not yet clear whether liability is based on equitable principles of good faith or on general tort principles, but, since damages may be awarded for interferences with rights which are not necessarily contractual or proprietary, it seems very likely that a new tort principle is developing.

4 *Stretching and Distorting the Meaning of Property*

"Property" also is a very imprecise concept. Property lawyers have considerable difficulty in providing an adequate definition of it.[49] This has frequently been of value to the courts for it has enabled them to extend the boundaries of the generally accepted notions of property to encompass other valuable interests not normally regarded as property. One of the functions of the law of torts is to protect property rights; therefore, every time the notion of property or "quasi-property" is stretched, so too is the tort remedy protecting the right.

For example, in the *Spanish Champagne* case the court referred to the need to protect property rights in the goodwill associated with the name of the product. In a recent Canadian decision, a court gave a remedy to a football player whose picture was used, without his authority, in car advertisements.[50] The court said, "One would think that the wrongful appropriation of that which in the business world has commercial value and is traded daily must *ipso facto* involve a property right which the courts protect. Property being an open-ended concept to protect the possession and use of that which has measurable commercial value, logic seems to impel such a result." In *Sim* v. *Heinz*[51] the Court of Appeal left open the question whether one could have a property interest in a voice, and in *Nagle* v. *Feilden*[52] the court went close to suggesting that in some cases the right to work could be equated with a property right.

Not all courts are prepared to extend remedies in tort by widening the notion of property. Thus, in the leading case of *Victoria Park Racing Co.* v. *Taylor*[53] the High Court of Australia was not prepared to protect the plaintiff's commercial interest in selling tickets to enter and view races by acting against the defendant, a neighbour, who broadcast descriptions of the races from his own land. The right to view a spectacle was not favoured as a proprietary right worthy of judicial protection.

[48] [1967] 1 W.L.R. 923; [1969] 1 W.L.R. 809. See also *Ansell Rubber Co.* v. *Allied Rubber* [1967] V.R. 37; *Mense* v. *Milenkovic* [1973] V.R. 784.
[49] See Cohen, "Dialogue on Private Property", (1954) 9 Rutgers L. Rev. 357.
[50] *Krouse* v. *Chrysler Ltd.* (1971) 25 D.L.R. (3d) 49. See also Pannam, "Unauthorised Use of Names or Photographs in Advertisements", (1966) 40 A.L.J. 4.
[51] [1959] 1 W.L.R. 313.
[52] [1966] 2 W.L.R. 1027. See also *David* v. *Abdul Cadar* [1963] 1 W.L.R. 834.
[53] (1937) 58 C.L.R. 479.

This case may be contrasted with a leading American decision, *International News Service* v. *Associated Press*,[54] where the Supreme Court of the United States was uncertain whether to protect the plaintiffs by extending the property concept or by creating a new tort. Arguably, the answer to one alternative provided the answer to the other. In that case the defendants took news stories of the war in France from the plaintiffs' newspapers in New York and telegraphed them to their newspapers in California in time to compete with the publication of these stories in the plaintiffs' own Californian newspapers. The majority of the Supreme Court gave the plaintiffs a remedy, partly by suggesting that in some cases there is a property or quasi-property in news, and partly by suggesting that there was a tort of unfair competition. This new tort which gave a remedy for "reaping without sowing" potentially covered a very wide area of unfair competition, but its use is surprisingly rather limited, particularly where it is inconsistent with federal patent and copyright laws[55]

From the jurisprudential point of view, the artificial stretching of property is open to criticism. Theoretically, it would be far better to acknowledge openly when one wishes to create and protect new rights.[56] However, one cannot ignore the fact that courts in many jurisdictions use this technique in the process of development.

5 *The use of the injunction as an extended remedy*

The injunction is, of course, an equitable remedy which is available in the discretion of the court usually where damages would be inadequate. In most cases the grant of the remedy presupposes the prior existence of an established right which has been, or is threatened to be, violated. Thus, in the area of tort law it is generally believed that a tort must first be established before the injunction can be granted.[57] What is not widely realised is that sometimes there is a "chicken and egg" element involved: the injunction may be granted where there is in fact no established tort or other right, which in turn leads to a tort or other right developing out of the remedy.

The reasons for this are linked first, to the fact that the injunction is an equitable remedy still frequently based upon principles of fairness and good faith, and, secondly, to the nature of "property", which equity is prepared to protect. The meaning of property is extended in many cases to justify the granting of an injunction. Once the remedy becomes accepted, the right becomes more firmly established, and a new tort may be developed by subsequent rationalisation. This creative process becomes easier where, as happens in some jurisdictions legislation enables a court of equity to

[54] 248 U.S. 215 (1918).
[55] *Sears, Roebuck & Co.* v. *Stiffel* 376 U.S. 225 (1964); *Compco Corp.* v. *Day-Brite Lighting Inc.* 376 U.S. 234 (1964).
[56] See Lloyd, "The Recognition of New Rights", [1961] C.L.P. 39.
[57] See *White* v. *Mellin* [1895] A.C. 154 at 163-4 per Lord Herschell L.C.

grant damages in addition to, or in substitution for, an injunction.[58] The developing tort of breach of confidence, referred to earlier, illustrates this point, and it has been argued elsewhere that there are signs that this process has been used to protect various rights of privacy.[59]

The availability of the injunction or the declaratory judgment in the law of torts is worthy of closer study.[60]

6 *The stretching and blurring of "unlawful" acts*

It has been seen that the principle that an act, otherwise lawful, cannot be converted into an unlawful act by the presence of malice is still firmly entrenched in the common law.

However, where the act complained of is in some way "unlawful" then the courts have been more ready to provide a civil remedy. A key issue, then, is to determine which kinds of "unlawful" act the courts will recognise in the law of torts. The wider the meaning attributed to it, the easier it will be to provide a remedy.

It is frequently said that words should be so construed as to be given the colour of their surroundings. Taken literally one might say that for the purposes of the law of torts an "unlawful" act should prima facie be construed as a "tortious" act. But, if the meaning is so restricted, it serves little purpose. For example, if one takes one branch of the tort of conspiracy as a tort requiring the use of "unlawful" means—two or more persons combining together to perform an unlawful act causing damage, one is simply saying that it is a tort to cause damage by tortious means. Thus "unlawful" must cover something more than tortious acts. An illustration of the word being construed at the opposite extreme may be seen in the criminal law case of *R.* v. *Chapman*[61] where a court, faced with the problem of giving some effect to a section of the Sexual Offences Act 1956 which made it an offence in certain circumstances to have unlawful sexual intercourse, held that "unlawful" must mean "immoral", that is, intercourse outside marriage. Similarly, in *Morrison* v. *N.B.C.*[62] the court seemed to regard "corrupt", "unethical" or "immoral" behaviour as unlawful for some purposes.

It is thus necessary to examine the various activities which somewhere in the law of torts have been regarded as unlawful.

(a) *Tortious and criminal acts*

As the word must cover more then tortious acts alone, it is not difficult, and it does make sense, to extend the meaning to include also criminal

[58] E.g. Supreme Court of Judicature (Consolidation) Act 1925, s. 37 (Eng.).
[59] See Dworkin, "The Common Law Protection of Privacy", (1967) U. Tas. L.R. 418.
[60] For accounts of this process, see Spry, *Equitable Remedies* (1971) pp. 306-11, 567-71; *Street on Torts*, (5th ed. 1972) 447-9.
[61] [1959] 1 Q.B. 100; see also *R.* v. *Russo* [1953] N.Z.L.R. 1008.
[62] 266 N.Y.S. 2d 406 (1965).

acts. Although most crimes—unlawful acts—are torts, there are some exceptions. Thus perjury, for public policy reasons, does not give rise to a civil cause of action.[63]

(b) *Breaches of statute*

In the *Beaudesert* decision the High Court of Australia expressly stopped short of calling breaches of statute "unlawful" for the purposes of the new tort, for the court recognised that to do so would destroy all the carefully constructed, though possibly illogical, barriers around the separate tort of breach of statutory duty, and would consequently permit a wide range of new actions. In *Beaudesert*, the defendant's act in taking gravel from a river without a licence was in breach of a statute. Similarly, in *Grand Central Car Park* v. *Tivoli Freeholders*[64] the defendants used their land as a car park, without having obtained statutory permits, to the detriment of the plaintiffs who had an adjoining car park. The court held that the *Beaudesert* principle was not intended to include cases where the unlawfulness arose merely by virtue of the fact that the trade was one being carried on without a permit from the local authority. The decision was reinforced by the fact that the court also held that the statute was not one which enabled the plaintiff to sue separately for breach of statutory duty.

In spite of this, courts have sometimes given a remedy for unlawful breach of a statute where no independent action for breach of statutory duty existed.[65] In England recently the judicial attitude has been inconsistent. In trade competition cases acts which were prima facie deemed contrary to the public interest by statute have been held to constitute unlawful means, even though there was no separate remedy for breach of statutory duty.[66] Some support for this attitude may be granted from the feeling that the courts have perhaps too narrowly restricted remedies for breach of statutory duty. Thus, in England, the Law Commissions' Report on the Interpretation of Statutes[67] recommended that there should be a new presumption that when a statutory duty is created, breach of the duty causing damage to any person should give that person a right of action. However, in industrial relations cases, the opposite conclusion was reached. Acts which constituted statutory "unfair industrial practices" were held not to be unlawful acts for the purposes of tort.[68] Whilst this may have been a desirable result looking at the policy of the Act, Lord Denning M.R.

[63] *Hargreaves* v. *Bretherton* [1959] 1 Q.B. 45. But the decision has been questioned. e.g. Weir: [1964] C.L.J. 225, 232.
[64] [1969] V.R. 62. See also *A.-G.* v. *Premier Line Ltd.* [1932] 1 Ch. 303 at p. 318.
[65] See *Fairbairn, Wright* v. *Levin* (1915) 34 N.Z.L.R. 1; *Cunard* v. *Stacey* [1955] 1 Lloyds Rep. 247; *Williams* v. *Hursey* (1959) 103 C.L.R. 30 at pp. 108-9 and 125.
[66] *Daily Mirror Newspapers Ltd.* v. *Gardner* [1968] 2 Q.B. 762; *Brekkes* v. *Cattel* [1972] Ch. 105.
[67] Law Com. 21 (1969).
[68] *Cory Lighterage* v. *T.G.W.U.* [1973] 2 All E.R. 558.

said that the question was one of *construction* of the Act. If this argument is accepted, surely it should follow that a breach of statute should not be unlawful for the purposes of tort law unless the statute also confers a civil action for breach of statutory duty.

The extent to which breaches of statute are to be regarded as unlawful in the law of torts is therefore an unresolved issue.

(c) *Contract*

The extent to which a contractual wrong may be unlawful for the purposes of tort is also uncertain. Yet it is a matter of considerable importance since it figures in disputes in economic and industrial matters.

It has been seen that an agreement in statutory restraint of trade is unlawful for the purposes of torts. Surprisingly, by virtue of long-standing authority,[69] an agreement in common law restraint of trade does not constitute such unlawful means.[70] Thus arises the first inconsistency.

In the tort of inducing a breach of contract a distinction is now drawn between a direct inducement of a breach—for example, A persuades B to break his contract with C—and an indirect inducement of a breach—for example, A persuades B's servant S not to do certain work for B so that B is forced to break his contract with C. In the former case, A's persuasion need not be independently unlawful; whereas, in the latter case, it is necessary for A to use unlawful means.[71] A reason advanced for this distinction is that trade rivalry in a competitive society is in itself perfectly legitimate and it has always been possible, for example, for one trader to buy up all the goods from a sole supplier in order that the latter should be unable to fulfil his contract with a competitor. "If all 'indirect influence' (however lawful in itself) which caused a contract to be broken were to become tortious, the flood of liability would engulf . . . the most innocent competitive profit-seeking trader."[72] Even this is not entirely true, however, for in some cases of inconsistent dealings an action may well lie.[73]

This tort has been stretched beyond inducing a breach of contract to: "deliberate and direct interference with the execution of a contract without that causing any breach",[74] although the extent of the interference is not settled. There is slight authority for suggesting that here, too, it is not necessary to show that direct interference is effected by independent unlawful means, and in one case defendants who lawfully transferred assets from one company with the object and effect of rendering impossible

[69] *Mogul Steamship Co.* v. *McGregor* [1892] A.C. 25.
[70] *Brekkes* v. *Cattel* [1971] 2 W.L.R. 647.
[71] *D.C. Thomson Ltd.* v. *Deakin* [1952] Ch. 646; *Stratford* v. *Lindley* [1965] A.C. 307; *Torquay Hotel* v. *Cousins* [1969] 2 Ch. 106.
[72] Wedderburn, (1968) 31 M.L.R. 440, 444-5.
[73] *D.C. Thomson Ltd.* v. *Deakin* at p. 694 per Jenkins L.J.; *B.M.T.A.* v. *Salvadori* [1949] Ch. 556; *Sleigh Ltd.* v. *Blight* [1969] V.R. 931.
[74] *Torquay Hotel* v. *Cousins* at 138 per Lord Denning M.R.

the company's performance of a contract to make a money payment to the plaintiffs were held liable.[75] But the commercial dangers of such law are considerable and it has been argued that in cases of interference short of breach the remedy should depend upon an unlawful act.[76]

The action for inducing a breach contract concerns a defendant who interferes with or causes a breach of somebody else's contract. A defendant may also break his own contract and cause loss to others. This was the issue faced by the House of Lords in *Rookes* v. *Barnard*[77] where it was held that if A threatens to break his own contract with B with the intent and effect of harming C, the tort of intimidation applied for the threat to break a contract was the threat of an unlawful act for tort purposes. Direct two-party intimidation also appears to have been recognised: where A threatens to break his contract with B with the intent and effect of injuring B,[78] although it has been argued that B should be confined to his remedy in contract.[79]

The uncertainty becomes even greater when the element of intimidation is absent. Thus, is it tortiously unlawful for A to break his contract with B with the intent and effect of harming C? If so, then what of a two party situation: it is unlawful means in tort for A to break his contract with the object and effect of injuring B? The confusion between remedies in contract and tort is complete. These matters have not yet been considered carefully in the common law world principally because no nominate tort is apparently applicable.[80] If, however, remedies are developing for intentional unlawful acts then these matters will arise.

Even the tort of conspiracy presents problems. In *Rookes* v. *Barnard*, Lord Devlin left open the question whether a conspiracy to break a contract would be unlawful means for the purposes of this tort, although it is difficult to see why there should be any difference between the torts of intimidation and conspiracy.[81]

(d) *Contempt of Court*

To cause harm by validly terminating one's own contract is, of course, not in itself unlawful. This was the issue raised in *Chapman* v. *Honig*[82] where the defendant landlord had maliciously served his tenant, the

[75] *Einhorn* v. *Westmount Investments Ltd.* (1969) 6 D.L.R. (3d) 71.
[76] Wedderburn, "Torts out of Contracts: Transatlantic Warnings", (1970) 33 M.L.R. 309.
[77] [1964] A.C. 1129.
[78] E.g. *D. & C. Builders* v. *Rees* [1966] 2 Q.B. 617, 625 per Lord Denning M.R.; *Cory Lighterage Ltd.* v. *T.G.W.U.* [1973] 2 All E.R. 341 and 558.
[79] Winfield and Jolowicz, *Law of Tort*, (9th ed. 1971) 467-8; cf. Heydon, *Economic Torts* (1973) 53-4.
[80] In the U.S.A. this might constitute a prima facie tort: e.g. *Wampler* v. *Palmerton* 439 P. 2d 601 (1968).
[81] [1964] A.C. 1129 at p. 1210. Cf. *Mark Fishing Co. Ltd.* v. *United Fishermen* (1970) 75 W.W.R. 385.
[82] [1963] 2 Q.B. 502.

plaintiff, with a "valid" notice to quit, became the tenant had given evidence against him in other court proceedings. The court held that as the notice to quit was the lawful termination of a contract, it could not be made unlawful by the presence of malice: the same act cannot at the same time as between the same parties be both a lawful exercise of a contractual right and a tortious act giving rise to a claim for damages. However, Lord Denning, dissenting, held that as the notice to quit was served in contempt of court it was unlawful, and so invalid, and the plaintiff had a remedy against the landlord in trespass for wrongfully being evicted. This dissent may now be the preferred view, since in a more recent Court of Appeal decision[83] it was held, without reference to *Chapman* v. *Honig*, that where the defendants refused to deal with the plaintiffs in contempt of a court order, the contempt was unlawful for the purposes of the law of tort.

(e) *An act one is "not at liberty to commit"*

It has been seen that the tort of inducing a breach of contract is being stretched to cases of interference short of breach. In *Torquay Hotel* v. *Cousins*[84] Lord Denning M.R., in so doing, stated that: ". . . if one person, without just cause or excuse, deliberately interferes with the trade or business of another and does so *by unlawful means, that is by an act which he is not at liberty to commit, then he is acting unlawfully.*"[85] This again is an example of the chicken and egg problem. On the one hand it is possible to argue that the court has by itself decided to extend the scope of the tort and therefore the act becomes unlawful; on the other hand, it is possible to say that because a person does an act which, although not in itself tortious, he is not at liberty to commit, it thereupon becomes unlawful, and may in turn become tortious. The process is untidy, but illustrates once again how concepts and words are blurred in the process of producing required results.

If one is to develop the idea that acts which a person is not at liberty to commit are unlawful for the purposes of tort, one is sliding towards the boundaries of unlawful acts and unethical or immoral behaviour in a similar way to the American court in *Morrison* v. *N.B.C.*[86] In the criminal law much concern has been expressed over the judicial readiness to create illegal conspiracies out of immoral but not unlawful behaviour[87] and no doubt this is a problem which would have to be faced also by civil courts.

[83] *Acrow (Automation) Ltd.* v. *Rex Chainbelt* [1971] 3 All E.R. 1175.
[84] [1969] 2 Ch. 106, 139.
[85] Italics supplied. The principle was repeated in *Acrow (Automation) Ltd.* v. *Rex. Chainbelt* [1971] 3 All E.R. 1175; *Brekkes* v. *Cattle* [1972] Ch. 105; *Cory Lighterage* v. *T.G.W.U.* [1973] 2 All E.R. 558, 568.
[86] 266 N.Y.S. 406 (1965), cf. *Ajello* v. *Worsley* [1898] 1 Ch. 274.
[87] *Shaw* v. *D.P.P.* [1962] A.C. 220; *Knuller* v. *D.P.P.* [1972] 3 W.L.R. 143.

Much more study into what should make an act unlawful for the purposes of the law of torts is required. Flexibility in the development of the law also needs the support of some logical consistency.

E THE SEARCH FOR A WIDE GENERAL PRINCIPLE

It has been shown earlier that while using the various techniques of common law development there have been occasional references to wider underlying principles. The *Beaudesert* principle itself was not merely a passing reference but a clearly formulated statement central to the case. Other more marginal references are scattered throughout the law reports. A few examples will suffice. In *Rookes* v. *Barnard* Lord Devlin suggested that a tort of malicious interference with business or livelihood might be developed.[88] In *Stratford* v. *Lindley* Lord Reid said that "interference with business is tortious if any unlawful means are employed" when referring to acts designed to prevent contracts being entered into.[89] Lord Denning has also been championing this principle,[90] and in the *Champagne* and *Sherry* cases[91] there were references to a principle of unfair competition or unfair trading.

Judicial dicta have been seized upon by some commentators to suggest that there may now be an embryonic wider principle. Weir suggests "that it is tortious intentionally to damage another by means which the actor was not at liberty to commit;"[92] Hoffman simply speaks of "causing loss by unlawful means."[93] Clerk and Lindsell refer to that "tort of uncertain ambit which consists of one person using unlawful means with the object and effect of causing direct, consequential damage to another".[94] A possible reformulation of *Beaudesert* could be "(Independently of trespass, negligence or nuisance but by an action for damages upon the case) a person who suffers harm as the consequence of an unlawful act directed against him by another without just cause or excuse is entitled to recover damages against that other."

Bearing in mind the preceding discussion, there may be some value in considering the elements of this principle.

1 *Intention and Malice*

The meaning of intention has long preoccupied the philosophers, and it is usually neither necessary nor desirable for lawyers to examine the

88 [1964] A.C. 1129, 1215.
89 [1965] A.C. 269, 324.
90 E.g. *Torquay Hotel* v. *Cousins*; *Acrow (Automation) Ltd.* v. *Rex Chainbelt.*
91 *Bollinger* v. *Costa Brava* [1960] 2 Ch. 262; *Vine Products Ltd.* v. *Mackenzie* [1969] R.P.C. 1.
92 "Chaos or Cosmos? *Rookes, Stratford* and the Economic Torts", [1964] C.L.J. 225.
93 (1965) 81 L.Q.R. 116, 140.
94 *Clerk and Lindsell on Torts* (13th ed. 1969) para. 804.

meaning in such depth. However, judicial discussion of this is usually too superficial.

In the *Beaudesert* case it was not clear whether the court meant first, simply "voluntary acts", that is, acts intended or designed to bring about some result but not necessarily the damage complained of, as contrasted with involuntary or accidental behaviour or, secondly, acts intended or designed to bring about the damage complained of, that is, acts "aimed at" the plaintiff. If the court was referring to the former meaning, the stated principle was far too wide. If, however, the court could have confined itself to the latter meaning (which it appeared unable to do on the facts) then the stated principle becomes less extreme.

A defendant may "aim at" or intend to injure a plaintiff either by direct or indirect action; he can act against the plaintiff himself and cause harm or he can act against a third party and cause harm to the plaintiff. In the latter case, the activity complained of may not itself be directed against the plaintiff but usually the intention to harm must be. The third party is the means of getting at the plaintiff. This distinction is particularly important, as has been mentioned, when dealing with contractual relations. Indeed most economic loss in business and industrial relations is likely to be caused indirectly.

By restricting the meaning broadly to acts "aimed at" the plaintiff one is brought immediately to the related matter of malice. How relevant is it that the act designed to injure the plaintiff is done with an improper motive? There is no problem where the intentional act is committed with the "disinterested malevolence" of the American prima facie tort. Where the motives for the act are mixed, then one has to establish whether it is necessary to look for the predominant motive as in the tort of conspiracy, or whether any additional non-malicious motive is sufficient to deprive the act of its "intentional" character. This issue is further linked to the companion elements of the principle to be considered: "unlawful" and "just cause".

It might be supposed that intentional acts require nothing less than an actual knowledge of the consequences together with the desire to bring them about. Yet in different areas of tortious liability the scope of intention has been widened to cover "constructive" knowledge of the consequences together with an "imputed" desire to bring them about. Thus it is said that a man is presumed to know the natural consequences of his act, and the concept of "recklessness' is brought within the fold of intention. In *Wilkinson* v. *Downton*[95] the defendant practical joker who told the plaintiff that her husband had been seriously injured may not have intended her to suffer severe nervous shock, in the truly intentional sense, but the act was "calculated to cause" harm in the wide sense of recklessness.

[95] [1897] 2 Q.B. 57.

In *Moorgate Mercantile Co.* v. *Finch*[96] the defendant who hired a car and deliberately tried to smuggle watches through customs did not intend to have the car confiscated because of the smuggling, but he was nonetheless held liable in the "intentional" tort of conversion: he was reckless and should have known the natural consequences of his act. In the tort of inducing a breach of contract the courts have relaxed the requirements of knowledge of the contract to include cases where the defendant was reckless and should have had knowledge.

The difficulties of extending intention to cover reckless acts are two-fold. First, liability for intentional wrongdoing is likely to cover a wider area than acts actually aimed at the plaintiff or malicious acts only. Secondly, the introduction of recklessness serves as a bridge between intentional and negligent acts with all the difficulties involved in that.[97] An illustration of the kind of problem that arises may be seen in the law relating to occupiers' liability to trespassers. At one time the legal rules were thought to be straightforward: an occupier was liable for intentionally injuring a trespasser, but he was not liable for negligence towards a trespasser. Even though the courts have denied that there can be different degrees of negligence,[98] judicial ingenuity coupled with the desire sometimes to compensate child trespassers for damage caused by negligent acts, led them sometimes to upgrade negligence into recklessness.[99]

The relationship between liability for intentional and negligent acts is still not properly worked out by the courts. It is assumed that where there is liability for harm caused by negligence *a fortiori* there should be liability for the same harm caused intentionally. Conversely, it is maintained that where it is not actionable to cause damage intentionally or maliciously, it cannot be actionable to cause the same damage negligently. This proposition was applied, to produce a surprising result, in *Langbrook Properties Ltd.* v. *Surrey C.C.*[1] where the defendants, who were constructing a motorway next to the plaintiff's land, pumped water out of their land causing foreseeable subsidence of the plaintiff's land. Applying ordinary negligence principles there is little doubt that a duty of care should have existed. However, the court was faced, with inter alia, the authority of *Bradford* v. *Pickles* which confirmed that a person is permitted to abstract water flowing in undefined channels beneath his land even though he does so maliciously, with the intention of harming his neighbour. Therefore, the

96 [1962] 2 Q.B. 701.
97 See the discussion in (1961) 24 M.L.R. 592; (1962) 25 M.L.R. 49 and 437.
98 "Generally speaking in civil cases 'gross' negligence has no more effect than negligence without the opprobrious epithet": *Caswell* v. *Powell Duffryn* [1940] A.C. 152, 175 per Lord Wright.
99 The logical difficulties of regarding the same act as reckless, and akin to intentional, on the one hand, and as grossly careless but distinct from negligence, on the other, are illustrated by the reasoning of the Court of Appeal in *Herrington* v. *B.R.B.* [1971] 2 W.L.R. 477. The House of Lords was able to avoid this difficulty by changing the law relating to trespassers: [1972] A.C. 877.
1 [1970] 1 W.L.R. 161.

same activity negligently causing harm should not involve liability. By this interesting reasoning an unattractive exception has been created to ordinary negligence rules. Although the point was not apparently taken, it could be argued that the cases are distinguishable. In *Bradford* v. *Pickles* it is nowhere clear which tort, if any, the plaintiffs were claiming had been committed. In any event the plaintiffs had suffered no damage to any property interest. They could only claim property rights in the water after they had reduced it into their possession when it flowed beneath their land; until such time they merely had an expectancy and the defendant was free to acquire property rights in the water when it passed beneath his land, and so legitimately defeat the expectancy. In the *Langbrook* case the plaintiffs were claiming in the tort of nuisance and they had suffered actual damage to their land. Thus, the situations were quite different.

This discussion demonstrates that the scope of the general principle will be affected considerably by the meaning given to intentional acts, and the concept has yet to be worked out clearly.

2 *Unlawful acts*

The nature of unlawful acts, or omissions, and many of the associated problems, have already been discussed. There is, at present, no consistency in the use of the term and many illustrations have been given to demonstrate this.

One of the uncomfortable features of using an unlawful act as the basis of liability for intentional harm is that it has a parasitic flavour about it. Parasitic damages are said to be awarded for damage to an interest not independently protected, merely because they can be added to damages awarded for breach of an established tort. Where legal developments are still taking place, parasitic damages are a useful, if not a logical, way of moving towards a remedy, even though Lord Denning has expressed the hope that the expression will disappear.[2] Whether or not the expression disappears, there is less justification for using this technique in a developed principle. The unlawful act should in some way be—to use a neutral word —"related" to the harm which is caused, even though it is arguable whether it should have to be causally connected with the harm. If the act is not so related liability may well turn on trivia rather more frequently than is desirable.[3] Thus, in *Beaudesert* the defendant's act in taking gravel was an unlawful "trespass" in that a licence to do so had not been obtained; but apparently the council would have had no difficulty in obtaining a licence had they realised the need and applied for it; in which case the plaintiff apparently would have had no remedy.

[2] *Spartan Steel* v. *Martin* [1972] 3 All E.R. 557.
[3] Jolowicz, "The Law of Tort and Non-Physical Loss", [1972] J.S.P.T.L. 91, 103; Heydon, *Economic Torts* (1973) 27.

The other problem, already adverted to, is that there is a danger of overstretching the capacity of "unlawful" behaviour. To do so would be to clash indirectly with *Bradford* v. *Pickles* and *Allen* v. *Flood*. It does seem incongruous in a modern society to have a rule which permits one individual or corporation (no matter how large and powerful) maliciously to cause damage by lawful means, and yet have another rule which classifies such acts as the tort of conspiracy if committed by two or more individuals. It may be that these cases require reconsideration and the courts should rationalise the position by basing the law on intentionally caused loss rather than on the theoretically more restrictive notion of causing such loss by unlawful means.[4] But as long as the general principle of liability is based upon unlawful activity it seems prudent not to distort its meaning beyond all recognition.

3 *Damage*

The first problem is whether a wide general principle should require the plaintiff to prove that he has suffered actual damage. In most cases this is bound to be so, particularly if it is argued that the remedy is part of, or springs from, the Action on the Case which itself requires proof of damage. Since we are dealing with economic relations, however, there might be some plaintiffs who require protection even though it may not be easy to establish actual loss. The range of potential plaintiffs in some respects would be considerably restricted if there were a requirement that the defendants' acts must be aimed at them, nevertheless the range is still wide. For example, in the *Spanish Champagne* case it covered all the producers in the Champagne district of France. Thus, to limit *locus standi* to those who can prove damage might be too restrictive.

A possible solution might be to permit the use of the injunction or declaration to those who have an interest in the defendant's activities but find it difficult to show special damage. For example, rival traders whose lawful trade is being affected by the unlawful activity of another might be granted an injunction or declaration, provided the requirement of actual or constructive intention to injure can be shown.

The second problem relates to the nervousness of the courts in expanding remedies for pure economic loss. It is not possible to limit recovery to loss flowing from property damage, and a simple application of basic tort rules may still open up the spectre of awards of vast sums as economic compensation. Thus, it is said that the intended consequences are never too remote. "The intention to injure the plaintiff . . . disposes of any question of remoteness of damage."[5] It has also been seen that a man is supposed to intend the natural consequences of his acts. It would be

[4] Heydon, "Justification in Intentional Economic Loss", (1970) 20 Univ. of Toronto Law Jo. 139, 177.
[5] *Quinn* v. *Leathem* [1901] A.C. 495, 537 per Lord Lindley.

consistent with general principle to include all economic losses which were reasonably foreseeable consequences of the unlawful intentional harm. What of direct but unintended and unforeseeable consequences? At first sight it would appear that *The Wagon Mound* would preclude recovery for such losses. But foreseeability may not be the test of remoteness in torts other than those involving negligence.[6] In *Beaudesert* the court referred to the "inevitable" consequences of the unlawful act, which, it has been argued, could go well beyond the *Wagon Mound* and back to *Polemis*.[7] Further, in *Doyle* v. *Olby Ltd.*[8] the Court of Appeal appears to have held that in the tort of deceit damages should compensate the plaintiff for *all* the actual loss he has suffered.

The rules relating to damage must be worked out carefully if a wide general principle is to be judicially acceptable.

4 *Justification*[9]

Seemingly, "justification" or "just cause" should be fundamental to any wide principle. It was an essential element in the early dicta of Bowen L.J. and in Holmes' "prima facie" tort theory, and, more recently, Lord Denning has indicated that the wide principle he is advocating must be "without just cause or excuse". It should be noted, though, that no such limitation was expressed in the formulation of the *Beaudesert* principle.

There has been little discussion of justification in tort law outside defamation. One of the best known examples is *Brimelow* v. *Casson*[10] where the defendants were held to be justified in inducing some chorus girls to break their contracts of employment because low wages were driving them to prostitution. More recently, the defence has been discussed in several of the breach of confidence cases. Thus, in *Initial Services Ltd.* v. *Putterill* Lord Denning, following earlier dicta that there is no confidence as to the disclosure of iniquity,[11] said that disclosure of confidential information was justified where there was "any misconduct of such a nature that it ought in the public interest to be disclosed to others. . . . The exception should extend to crimes, frauds and misdeeds, both those actually committed as well as those in contemplation, provided always—and this is essential—that the disclosure is justified in the public interest."[12]

This emphasis on the public interest gives the courts considerable discretion, and it is possible for them to discuss openly the various issues of policy which they consider relevant to their decisions.

[6] *Wagon Mound* [1961] A.C. 388 at 427.
[7] Dworkin and Harari (1967) A.L.J. at 348.
[8] [1969] 2 All E.R. 119. For a criticism see Treitel (1969) 32 M.L.R. 556.
[9] See Heydon, "Justification in Intentional Economic Loss", (1970) 20 Univ. of Toronto Law Jo. 139, 177.
[10] [1924] 1 Ch. 302.
[11] *Gartside* v. *Outram* (1856) 3 Jir. (N.S.) 39 per Wood V.C.
[12] See also *Fraser* v. *Evans* [1969] 1 Q.B. 369; *Hubbard* v. *Vosper* [1972] 1 All E.R. 1023; *Church of Scientology of California* v. *Kaufman* [1973] R.P.C. 627; *Beloff* v. *Pressdram* [1973] 1 All E.R. 241, 260.

As has been mentioned, conceptually justification is difficult to relate to certain other elements of a general theory. First, it must be consistent with intention. If the meaning of intention is confined to malice or disinterested malevolence then there would seem to be little scope for justification, since malice would presumably destroy it. Thus, justification can only operate if "intention" is given a wider meaning. Secondly, a similar problem arises with the requirement of unlawful means, where, it could be argued, the two concepts were inversely related: if the act is lawful, there is just cause, if unlawful, no just cause. There are statements in support of the view that unlawful acts cannot be justified.[13] However, this is not firmly adhered to. Thus, it has been suggested that justification may be a defence in the tort of intimidation[14] and the U.S. Restatement on Torts states that there are exceptions to the rule that illegal means cannot be justified.[15] Presumably the defence should apply when the unlawful act about which the plaintiff complains is fairly trivial and the defendant has far greater merit on his side. This approach has been stretched somewhat recently by Lord Denning who has suggested that if the plaintiff, for example, a trade union official, is a trouble-maker who is acting out of spite or malice to provoke the Union officials to commit unlawful acts, the defence of justification may succeed.[16] This smacks of the equitable "clean hands" principle, but whether it will be accepted is yet to be seen.

F IS THE SEARCH FOR A WIDE GENERAL PRINCIPLE WORTH WHILE?

Is there any value in producing a wide general principle? There is high authority which discourages it. Thus Dixon J. has expressed doubts as to what can be gained by large generalisations.[17] Nevertheless a wide principle has considerable appeal. It is the mark of a more developed society to have a broad principle, conceptually clear, which has been rationalised from the earlier law. A broad principle will encompass a wider range of grievances, and fewer wrongs will go unremedied simply because they do not fit within narrower tort categories. The courts will have a greater discretion to deal openly with policy issues, the more so if the requirement of an "unlawful" act is removed from the principle, but even if, as is likely, the requirement still exists.

The price paid for conceptual clarity, however, may be high. Several criticisms have been advanced against such developments:

[13] E.g. *Klein* v. *Jenoves* [1932] 3 D.L.R. 571 at 575 per Riddall J.A.
[14] *Rookes* v. *Barnard* [1964] A.C. 1129 at 1206; *Morgan* v. *Fry* [1968] 3 W.L.R. 516, 517.
[15] Section 767b.
[16] *Morgan* v. *Fry* [1968] 2 Q.B. 710, 729; *Cory Lighterage* v. *T.G.W.U.* [1973] 2 All E.R. 558, 566.
[17] *Victoria Park Racing Co.* v. *Taylor* (1937) 58 C.L.R. 479.

1 *Undermining the limits of existing torts*

The development of a wide principle of tortious liability could have a considerable impact upon other branches of the law of torts, undermining some of the limitations imposed upon existing torts. It has been shown that the *Beaudesert* principle, unless considerably modified, could have this effect.[18] The American prima facie tort has avoided this problem by making this remedy and other tortious remedies mutually exclusive. But this is not a problem incapable of solution; it simply requires a more careful rationalisation of the general principle and an awareness that existing remedies elsewhere should not be distorted inadvertently.

2 *Judicial remedies may conflict with related legislation*

Most tort actions in respect of intentionally caused economic harm have, until now, been concerned with two main areas of activity, industrial relations and business competition. In both areas there is increasing statutory intervention in many jurisdictions.

The judicial development of the law relating to industrial relations has not always been consistent with legislative policy, although sometimes the dangers are seen and avoided. Thus, in *Midland Cold Storage* v. *Steer*[19] Megarry J., leaving open the question whether conspiracy or unlawful means apart, there was a tort of wrongfully inducing a person not to enter into a contract, was not prepared to develop the common law in such a way as would enable the plaintiff to avoid the net of the Industrial Relations Act 1971.

With regard to business competition there have been signs that developing remedies in tort have produced results which are inconsistent with the rationale of patents and copyright legislation. The warning light has been heeded in America[20] but has not yet been appreciated fully in England where "the courts have been prepared to grant protection under the tort of passing-off beyond the limits laid down by Parliament . . . because the problems are rarely explicitly recognised".[21]

Another example of judicial intervention by one court in areas which by legislation are within the jurisdiction of another court can be seen in *Daily Mirror* v. *Gardner*[22] where it was said that trade restrictions would be regarded as contrary to the public interest although they had not yet been formally so declared by the Restrictive Practices Court. The difficulty here is that ordinary courts took this decision without the full benefit of the economic evidence which would come before the Restrictive Practices Court and without having the expertise of that court.

[18] (1967) 40 A.L.J. 348-9. Cf. Mesher, (1971) 34 M.L.R. 317, 321-3.
[19] [1972] Ch. 630; see also *Cory Lighterage* v. *T.G.W.U.* [1973] 2 All E.R. 568.
[20] *Sears, Roebuck & Co.* v. *Stiffel* 376 U.S. 225 (1964).
[21] Evans, "Passing-Off and the Problem of Product Simulation", (1968) 31 M.L.R. 642.
[22] [1968] 2 Q.B. 762; see also *Brekkes* v. *Cattel* [1972] Ch. 105.

The greater the legislative intervention in these areas, the greater is the danger that independent common law development could conflict with it.

3 *The courts may not be the most appropriate bodies to deal with these matters*

It has already been mentioned that a wide general principle would probably involve the judiciary in dealings openly with questions of social and economic policy. Policy questions are now being discussed more openly.[23] However, it is possible to sympathise with some judges who are reluctant to enter too confidently "a battlefield of the conflict between capital and labour, between business competitors and those who have conflicting claims in the economic struggle".[24]

Even where the courts are not so reluctant, there is a difference between being prepared to make policy decisions and being properly equipped to make them. One of the most recent developments in the common law world has been the setting up of law reform bodies which take their time in the preparation of reports, receive expert evidence from a wide range of sources and eventually submit recommendations frequently accompanied by draft legislation which, unlike earlier times, are now often legislated upon within a reasonable time of report. How can one compare these with, for example, the fairly trivial and intuitive discussion of policy factors in cases of negligent acts causing economic loss?[25]

4 *Inappropriateness of individual specific remedies*

In the area of economic activity, certain types of harmful conduct may affect a wide range of persons, without necessarily causing all such persons damage or giving them an existing remedy in tort. The development of a remedy may depend upon the accident of an individual who is willing to sue suffering damage and also upon the evolving position of the common law. Sometimes important issues may be left unresolved judicially for some time.

Legislation may not only provide remedies, but the kind of remedy may be far more effective than the individual tort action. For example, in England, the *Fair Trading Act* 1973 created the post of Director-General of Fair Trading. One of his very wide powers is to take proceedings for a court order against persons where he believes that their business conduct is unfair and detrimental to consumers. "Unfair" is defined very widely to cover acts which correspond with most of the types of "unlawful" acts earlier discussed. Thus, in a sense, the remedy is by way of injunction

[23] See Symmons, "The Duty of Care in Negligence: Recently Expressed Policy Elements", (1971) 34 M.L.R. 394 and 528. See also *Esso Petroleum* v. *Harper* [1968] A.C. 269.
[24] *Prosser on Torts.*
[25] *Spartan Steel* v. *Martin* [1973] 1 Q.B. 27.

rather than damages and the action is not brought by an affected individual but on behalf of an entire group of consumers.

5 *The role of loss insurance*

In recent times consideration has been given to the desirability of making some injured persons bear their own losses, covering these by an insurance policy based on such loss. "It is essential . . . that, considered as a technique for shifting losses, the law of tort should not be thought of as working in isolation. . . . In some cases insurance against the risk of a loss occurring provides more economically and more efficiently for its absorption than does insurance against liability. . . . In discussing any breach of the law of tort, therefore, we must no longer be content to look only at the arguments in favour of imposing liability in a given class of case to see if they are convincing. There may also be positive reasons of social or economic policy for the deliberate choice of a rule of non-liability which should not be overlooked."[26]

Economic activity is fraught with risks which must be accepted and possibly guarded against by insurance in many cases.

6 *Conclusions*

It is always disappointing to arrive at a negative conclusion. But it may well be that the time is still not ripe for the development of a wider general principle. In 1964 it was said that "the consolidation of the now separate torts under a single cause of action appears unrewarding. Though similar interests run throughout the area, their combination and intensity vary; a single theory of action seems likely to mask these differences without offering any compensating advantage."[27]

It is difficult to disagree with this view. The principles which have been examined are all open-ended and full of potential problems. It may well be that a full investigation of the problems which require a general remedy would indicate more clearly what kind of general remedy should be provided.

[26] Jolowicz, "Law of Tort and Non-Physical Loss", (1972) J.S.P.T.L. 91-2.
[27] (1964) Harv. L. Rev. 888, 891. See also Wedderburn (1970) 33 M.L.R. 309 and (1972) 35 M.L.R. 184.